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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. LEVAR JAMES GILBERT, Defendant and Appellant.	F074640 (Super. Ct. No. MCR052969) **OPINION**

APPEAL from a judgment of the Superior Court of Madera County. Joseph A. Soldani, Judge.

Elizabeth Campbell, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Daniel B. Bernstein and Peter H. Smith, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

Following his release from prison for committing an act of domestic violence against his wife, defendant Levar James Gilbert attempted to locate her, notwithstanding the criminal protective order in effect prohibiting contact. He was arrested, charged and convicted by jury of one count of stalking (Pen. Code, § 646.9, subd. (a) (count 1)),[1] one count of stalking with a protective order in effect (§ 646.9, subd. (b) (count 2)), and two misdemeanor counts of violating a protective order (§ 273.6, subd. (a) (counts 3 and 4)). In a bifurcated proceeding, the trial court found true the special allegations that defendant has a prior conviction for inflicting corporal injury on a spouse in violation of section 273.5 (§ 646.9, subd. (c)) and served a prior prison term (§ 667.5, subd. (b)). The court sentenced defendant to the upper term of five years pursuant to subdivision (c)(1) of section 646.9, plus an additional one year for the prior prison term enhancement, for a total determinate term of six years in prison. The court imposed a concurrent upper term of four years on count 2, stayed under section 654, and imposed terms of 90 days in jail, with credit for time served, on counts 3 and 4.

On appeal, defendant claims that his stalking convictions are not supported by substantial evidence of a credible threat against his wife. He also claims the trial court erred in denying his motion for a continuance to file a new trial motion. If we affirm the trial court's ruling, defendant claims his trial counsel's failure to file a timely motion for a new trial constituted ineffective assistance of counsel.

We conclude that defendant's stalking convictions are supported by substantial evidence, the trial court did not abuse its discretion in denying defendant's motion for a continuance, and trial counsel did not render ineffective assistance of counsel in failing to bring a timely new trial motion. We therefore affirm the judgment.

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[1] All further statutory references are to the Penal Code unless otherwise stated.

FACTUAL SUMMARY

I. Facts Underlying Charged Acts

A. Period of Defendant's Incarceration

Defendant and the victim, Christina R., married in 2009 and, at the time of trial in 2016, they had two young children together. Defendant committed three acts of domestic violence against Christina: one in 2012, one in 2013 and one in 2014. The 2014 incident resulted in defendant's arrest and conviction for infliction of corporal injury on a spouse and being a felon in possession of a firearm. (§§ 273.5, subd. (a), 29800, subd. (a)(1).) At the time of defendant's conviction on July 2, 2014, the trial court issued a criminal protective order prohibiting defendant from having contact with Christina for a period of 10 years. Defendant received a prison sentence of three years eight months. Several months after defendant was convicted, Christina filed for divorce and, in September 2015, she and her children moved out of the house she and defendant had shared in 2014. She did not notify him of her new address.

Christina testified that while defendant was in prison in 2014 and 2015, he wrote her letters daily and sometimes more than once a day. She described the volume of letters as overwhelming and said she shredded most of them without reading them. She described the letters she read as inappropriate because they were sexual in nature. After she moved in 2015, she continued to receive letters from defendant because her mail was forwarded from her former address. Christina did not recall if all the letters were addressed to her, did not recall when the last letter she read was received, and did not recall when the last letter was received, but she stated she continued to receive letters until defendant's release from prison.

At the time of trial, Christina had two children with defendant, ages two and five, and a 14-year-old. On direct examination, Christina stated she did not recall if her children wrote to defendant in prison and she denied she wrote to defendant. On cross-examination, however, she first stated she did not recall if she wrote to defendant and

then, after defense counsel produced two letters, she admitted writing those letters. She explained the first one was written shortly after defendant went to prison in July 2014 and the second one was written in late October 2014, after she had filed for divorce. Christina conceded that the second letter was signed "'Love always, the Gilbert Family'" and that she wrote, "'We will all be writing you more often and sending things.'" On redirect examination, Christina said that she was being harassed by third parties at the time, including at her job by her mother-in-law; she had struggled with the decision to file for divorce because keeping the family together had been important; and she wanted to clarify things so there were no misunderstandings, but that she did not write to defendant after the second letter. On recross-examination, Christina denied the contents of the two letters pertained to finalizing their divorce and said defense counsel did not give her a chance to read and explain the letters. She then stated, "These two different letters have two different contents. Thank you," and asked to be dismissed as a witness.[2]

In addition to the letters, Christina testified that defendant also called her from prison three to four times a week and said mean, inappropriate things to her. Asked for specifics, she stated that he called her a bitch, wanted money and told her she should not be alive. She also stated that he told her not to testify in the 2014 domestic violence case and, through his mother, told her not to testify in this case. She testified that defendant had prison guards and other inmates call her to ask for money, and that his mother would call her, including at her job, and threaten to "kick [her] ass" if she did not send

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2 The record reflects that on cross-examination, defense counsel provided Christina with both letters to review and the letters were entered into evidence for the jury to review. We cannot assess Christina's demeanor on the cold record nor do we do so in considering the sufficiency of the evidence, discussed *post*. We note, however, that Christina's credibility was an issue that was discussed in this case, with defense counsel taking the position that she was not a credible witness and the prosecutor taking the position that she was shaky, crying and frightened on the stand, evidencing her fear of defendant. In any event, it is clear from the record that she was not an easy witness for defense counsel to examine, and that as to the letters, she desired to read them to the jury and then explain them, which she was not permitted to do.

defendant money, photographs of the children and artwork by the children. Christina said she applied to visit defendant in prison because his mother threatened her, but she told his mother she did not want to visit defendant and she did not do so. However, she did split up the money in their joint account and sent him his half, which she viewed as fair.

B. Events Following Defendant's Release from Prison

1. Contact with Former Neighbors

a. Lisa M.

Defendant was released from prison on or shortly before January 4, 2016, and Christina did not have notice of his release. On the night of January 4, 2016, defendant knocked on the door of Lisa M., a close friend of Christina's who lived within a few blocks of the home Christina and defendant formerly shared in 2014. When she answered the door, he said, "'Lisa, where's my family? I went to my house and they're not there.'" Lisa was not aware of Christina's current address, and she told defendant they moved and she did not know where they lived. Lisa described defendant's demeanor as agitated and upset, although not toward her; she stated he was loud, and he paced back and forth on her porch. Defendant asked to use Lisa's phone. She agreed and heard him say, "'Christina, this is your husband. I'm home. Where are you?'"

Lisa testified that she felt nervous and possibly threatened because she was aware of Christina's and defendant's history of domestic violence, defendant had just been released from prison, it was nighttime, and she was at home with her young adult children. Lisa offered to give defendant a ride because she did not want him near her house or children and, at his request, she dropped him off at a location approximately one and one-half miles away. Lisa testified that defendant was cordial to her and happy he found somewhere to stay.

b. T.J.

T.J., who had grown up with Christina and lived approximately six houses from Christina's and defendant's former residence, also testified that defendant showed up at her house that night looking for Christina and the children. Although T.J. knew where Christina was currently living, she did not provide defendant with any information because, in her view, their situation was not any of her business. At defendant's request, T.J. called Christina and informed her that defendant was at T.J.'s house looking for her. T.J. told defendant that Christina had not answered the phone and she did not know where Christina was. T.J. acknowledged she was upset about having to testify and, on cross-examination, she said she told an investigator that defendant was polite that night and she did not feel threatened.

2. Attempted Phone Contact with Christina

Christina testified that she was notified by both Lisa and T.J. that defendant had come to their houses looking for her, and that he was angry and upset. In addition, Christina said that defendant left at least two or three messages for her stating that he was looking for her. Christina called the police and an officer responded to her residence at approximately 9:45 p.m. The officer who was dispatched to Christina's house testified that Christina was scared and her eyes were watery, she was shaking, her voice was quivering and she was breathing as someone who has been crying breathes. The officer later returned to the house to let Christina know that they confirmed there was a valid protective order in place and they were obtaining a copy from Contra Costa County, where it was issued.

3. Appearance at Christina's Workplace

The next morning, Christina called her supervisor, G.Z., and notified her that defendant was out of prison and the police were looking for him because he had been to

three houses trying to find her.[3] Christina described what he would probably be wearing, and said he was in violation of a protective order and would very likely show up at her work. When G.Z. subsequently arrived at work, Christina was already there. Shortly thereafter, G.Z. was notified that defendant was in the lobby. G.Z. went to the lobby and she asked defendant if she could help him. Defendant asked to speak to Christina a couple of times and G.Z. described him as adamant. Staff had already alerted law enforcement and they arrived thereafter.

II. Uncharged Acts of Domestic Violence

A. 2012 Incident

Christina testified that defendant became violent toward her for the first time in May 2012 when she was asleep in bed with their young child. Defendant had been drinking with neighbors and he came home, pulled her out of bed, and started ripping her hair and strangling her. She testified he called her by name and said "really degrading things," and twisted her body with sufficient force to cause her to urinate and defecate on herself. She described sustaining a large, weeping contusion on her head and said she was hospitalized, but the police only talked to defendant about the incident.

B. 2013 Incident

The second incident occurred when Christina and defendant were at his mother's house in Vallejo in 2013, and she was pregnant with their second child. Defendant had been drinking with one of his friends and he tried to kick the door down to get her. Christina testified that defendant's mother grabbed him, called for help and beat him with an ice pick. When the police arrived, defendant was passed out from drinking and they did not take any action. Christina and her children spent the rest of the night in her mother-in-law's bedroom with her mother-in-law.

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[3] G.Z.'s testimony regarding what Christina told her was admitted for the limited purpose of showing G.Z.'s state of mind.

C. 2014 Incident

Finally, in March 2014, Christina and defendant were staying at a hotel in Concord and had attended a family party. He had been drinking that night and she had not. After she drove them back to the hotel at approximately 2:00 a.m., he started strangling her and pulling her hair out. He dragged her off the bed and into the bathroom, where he had her facedown underneath the bathroom sink as he strangled her. She testified that he stated, "'You fucking bitch. I'm going to blow your brains out. I'm in control and you're going to die.'" Defendant had a gun wrapped up behind the refrigerator, and Christina testified that he was trying to get it and unwrap it while he was strangling her. She was able to call 911 on her phone and when the dispatcher came on the line, defendant left the room.

Officers were dispatched to the hotel after receiving two phone calls. One of the responding officers testified that the room was in disarray and Christina was sitting on the bed, visibly shaken. She was crying, and her hair and clothing were in disarray. She had two bleeding lacerations on her neck approximately six to seven centimeters wide, the photographs of which were entered into evidence. Officers located a loaded .45-caliber firearm wrapped in a T-shirt under the sink in the room.

Christina testified that she was hospitalized for her injuries, and she had "special treatment" and therapy for her neck injuries. She described the treatment as tape to protect the wounds, which she wore for a year or so. On cross-examination, she testified that defendant bashed her head against the floor repeatedly and knocked her bottom teeth out, she has scars on her arms and down her legs from being dragged on the floor, and defendant dug his fingers and nails four inches deep into her neck.

DISCUSSION

I. Sufficiency of the Evidence Supporting Stalking Convictions

A. Standard of Review

"The Due Process Clause of the Fourteenth Amendment denies States the power to deprive the accused of liberty unless the prosecution proves beyond a reasonable doubt every element of the charged offense" (*Carella v. California* (1989) 491 U.S. 263, 265, citing *In re Winship* (1970) 397 U.S. 358, 364), and the verdict must be supported by substantial evidence (*People v. Zamudio* (2008) 43 Cal.4th 327, 357). On appeal, the relevant inquiry governing a challenge to the sufficiency of the evidence "'is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" (*People v. Nguyen* (2015) 61 Cal.4th 1015, 1055.) "The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Zamudio*, *supra*, at p. 357.)

"In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence." (*People v. Zamudio*, *supra*, 43 Cal.4th at p. 357.) "'[I]t is the jury, not the appellate court which must be convinced of the defendant's guilt ….'" (*People v. Nguyen*, *supra*, 61 Cal.4th at pp. 1055–1056.) "A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support"' the jury's verdict." (*People v. Zamudio*, *supra*, at p. 357.) However, "speculation, supposition and suspicion are patently insufficient to support an inference of fact." (*People v. Franklin* (2016) 248 Cal.App.4th 938, 951; accord, *People v. Marshall* (1997) 15 Cal.4th 1, 35; *People v. Xiong* (2013) 215 Cal.App.4th 1259, 1268.)

B. Analysis

1. Credible Threat

Defendant was convicted of stalking Christina between July 2, 2014, and January 5, 2016, in violation of section 646.9, subdivision (a), which provides: "Any person who willfully, maliciously, and repeatedly follows or willfully and maliciously harasses another person and who makes a credible threat with the intent to place that person in reasonable fear for his or her safety, or the safety of his or her immediate family is guilty of the crime of stalking …."

Relevant to defendant's claim on appeal, the statute defines "'credible threat' [as] a verbal or written threat, including that performed through the use of an electronic communication device, or a threat implied by a pattern of conduct or a combination of verbal, written, or electronically communicated statements and conduct, made with the intent to place the person [who] is the target of the threat in reasonable fear for his or her safety or the safety of his or her family, and made with the apparent ability to carry out the threat so as to cause the person who is the target of the threat to reasonably fear for his or her safety or the safety of his or her family. It is not necessary to prove that the defendant had the intent to actually carry out the threat. The present incarceration of a person making the threat shall not be a bar to prosecution under this section. Constitutionally protected activity is not included within the meaning of 'credible threat.'"[4] (§ 646.9, subd. (g).)

2. Substantial Evidence Supports Credible Threat Element

Defendant's substantial evidence challenge centers on the evidence supporting the jury's finding that he made a credible threat against Christina with the intent of placing

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[4] In count 2, defendant was convicted of violating subdivision (b) of section 646.9, which provides, "Any person who violates subdivision (a) when there is a temporary restraining order, injunction, or any other court order in effect prohibiting the behavior described in subdivision (a) against the same party, shall be punished by imprisonment in the state prison for two, three, or four years."

her in reasonable fear of her safety.[5] In this case, the prosecutor proceeded on the theory that defendant expressly threatened Christina over the phone from prison when he told her she should not be alive and that he impliedly threatened her through his engagement in a pattern of conduct from the time of his incarceration to his arrest at her place of employment. Defendant concedes that a "'credible threat'" may be implied from a course of conduct (see *People v. Gonzalez* (2017) 2 Cal.5th 1138, 1147), but he argues that the evidence is insufficient to show a credible threat. We disagree.

"[S]talking is an act of domestic violence." (*People v. Ogle* (2010) 185 Cal.App.4th 1138, 1140.) "[I]n determining whether a [credible] threat occurred [within the meaning of the stalking statute], *the entire factual context*, including the surrounding events and the reaction of the listeners, must be considered." (*People v. Falck* (1997) 52 Cal.App.4th 287, 298, italics added; accord, *People v. McPheeters* (2013) 218 Cal.App.4th 124, 138; *People v. Uecker* (2009) 172 Cal.App.4th 583, 598, fn. 10.) In our view, defendant's challenge to his conviction overlooks some evidence and, in general, casts the evidence in the light most favorable to him.

Citing *People v. Halgren* (1996) 52 Cal.App.4th 1223, *People v. Falck*, *supra*, 52 Cal.App.4th 287, *People v. Uecker*, *supra*, 172 Cal.App.4th 583, and *People v. McPheeters*, *supra*, 218 Cal.App.4th 124, defendant also suggests that because other cases addressing this issue "had the benefit of more compelling records," the evidence here falls short of supporting a stalking conviction. However, an argument in this vein and made in reliance on these same cases was advanced in *People v. Lopez* (2015) 240 Cal.App.4th 436 and rejected by the Court of Appeal, which accurately observed, "None of these cases … suggest their particular facts set the floor for a course of conduct

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5 Under the statute, "'harasses' means engages in a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, torments, or terrorizes the person, and that serves no legitimate purpose." (§ 646.9, subd. (e).) Defendant does not challenge the sufficiency of the evidence as to this element of the offense.

constituting an implied threat." (*Id.* at p. 451.) Thus, that the defendants in other criminal cases may have engaged in a pattern of behavior more extensive, or of a different degree, than that here offers defendant no shelter from the consequences of his own criminal conduct. (*Ibid.*)

Viewing the evidence in the light most favorable to the prosecution (*People v. Zamudio*, *supra*, 43 Cal.4th at p. 357), defendant violently attacked and injured Christina on two prior occasions, dragging her from the bed she was sharing with their child during the first one and strangling her during both. He also attempted to kick down a door to get to her on a third occasion, at which time she was pregnant and during which children, including her child with defendant, were present. During the third uncharged incident, which led to defendant's arrest and incarceration in 2014, he told Christina he was going to blow her brains out and she was going to die. Police who responded located a loaded firearm in the room and Christina testified defendant was trying to get the weapon while he was strangling her.

Upon defendant's conviction for the 2014 incident, the court issued a criminal protective order prohibiting defendant from any contact with Christina for a period of 10 years. Against this background, defendant deluged Christina with letters up until his release from prison in early 2016. While she shredded most of the letters without reading them, Christina testified that those she read contained inappropriate sexual material and, it bears repeating, *all* the letters were sent in violation of a protective order prohibiting contact. Defendant also repeatedly called Christina from prison, telling her on one occasion that she did not deserve to be alive.[6]

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6 Defendant's contention, made in his reply brief, that this threat occurred outside of the charged time period is not supported by the record and is contrary to his opening brief, which accurately reflects that it is the threat not to testify which appears to be outside the relevant time period. Christina clarified on recross-examination that defendant first told her not to testify in Contra Costa County, which ties that statement to his then-pending trial for the 2014 domestic violence incident. However, she testified that when he told her she should not "even be alive,"

After defendant was released from prison, he immediately made his way from the Amtrak station to his old neighborhood a few miles away. Finding Christina and the children gone, defendant knocked on the doors of at least two neighbors in an effort to find her and he borrowed the phone of one to leave a message for her. He called her several other times that night and, as she anticipated, he showed up at her work early in the day the next morning, demanding to speak with her.

Christina testified that she made the difficult decision to divorce defendant after he was incarcerated for attacking her in 2014, she feared defendant then, she continued to fear defendant, and she did not want to have any contact with him. As well, the officer who responded to the hotel room in 2014 and the officer who responded to Christina's house on January 4, 2016, testified to Christina's state of distress on those occasions.

Based on arguments made postverdict by both counsel, jurors did not find every aspect of Christina's testimony credible, but to whatever extent jurors declined to credit certain aspects, they were not required to either accept or reject her testimony in whole. To the contrary, they were instructed pursuant to CALCRIM No. 105 and, in relevant part, "If you decide that a witness deliberately lied about something significant in this case, you should consider not believing anything that witness says. Or, if you think the witness lied about some things, but told the truth about others, you may simply accept the part that you think is true and ignore the rest."

In convicting defendant of stalking, the jury made the finding that the prosecutor proved the elements of the stalking offense beyond a reasonable doubt and, in reviewing the record, we find sufficient evidence that defendant made a credible threat against Christina, both expressly in threatening her over the phone from prison and impliedly through a course of conduct that occurred after he was incarcerated for physically

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he was calling from prison while serving his sentence for the 2014 incident of domestic violence, placing the threat within the charged time period.

attacking her and despite a protective order forbidding him from contacting her. As discussed, that course of conduct not only included an "overwhelming" volume of letters, but phone calls as well, and it culminated in defendant's persistent attempts to locate Christina immediately following his release from prison, the final of which was successful given that defendant showed up at Christina's place of employment and asked to speak with her "adamantly" despite the court order prohibiting him from doing so.

II. Denial of Request for Continuance to File New Trial Motion

A. Background

The jury returned its verdicts on June 14, 2016, and the sentencing hearing was set for July 12, 2016. The hearing was subsequently continued first to September 9, 2016, on defendant's motion and then to September 16, 2016, on the court's motion.

During the hearing, the court denied defendant's motion to dismiss the stalking counts (§ 1385), motion to reduce the felony stalking counts to misdemeanors (§ 17, subd. (b)), and motion to grant probation (§ 1203, subd. (e)(4)).[7] Defense counsel then brought an oral motion requesting a continuance to file a motion for a new trial on the grounds that he intended to seek telephone records relating to Christina's testimony that defendant called her repeatedly from prison and to investigate Christina's claim that defendant's mother called her place of employment several weeks before trial and "cussed out" multiple people, including someone named Maribel M. (§ 1050, subd. (e).) As well, counsel indicated a desire to investigate juror misconduct. The court found that defendant had "ample time" to bring a motion for a new trial and denied his request for a continuance as untimely.

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[7] After defendant was sentenced, section 1385 was amended (Stats. 2018, ch. 1013, § 2, pp. 5–6), section 17 was amended (Stats. 2018, ch. 18, § 1, pp. 1–2), and section 1203 was amended twice (Stats. 2016, ch. 706, § 1, pp. 1–2 & Stats. 2018, ch. 423, § 90, pp. 155–159), but those amendments are not relevant to the issues raised in this appeal.

On appeal, defendant claims the trial court abused its discretion in denying his request for a continuance and, if we disagree and find no error, he claims trial counsel rendered ineffective assistance of counsel in failing to bring a timely motion for a new trial. As discussed in the sections that follow, we reject both claims.

B. Standard of Review

A continuance may only be granted for good cause, and trial courts have broad discretion to determine whether good cause exists.[8] (§ 1050, subd. (e); *People v. Alexander* (2010) 49 Cal.4th 846, 934.) "'The party challenging a ruling on a continuance bears the burden of establishing an abuse of discretion, and an order denying a continuance is seldom successfully attacked.'" (*People v. Anderson* (2018) 5 Cal.5th 372, 397, quoting *People v. Beames* (2007) 40 Cal.4th 907, 920.) "While a showing of good cause requires that both counsel and the defendant demonstrate they have prepared for trial with due diligence [citation], the trial court may not exercise its discretion 'so as to deprive the defendant or his attorney of a reasonable opportunity to prepare.' [Citation.] [¶] A reviewing court considers the circumstances of each case and the reasons presented for the request to determine whether a trial court's denial of a continuance was so arbitrary as to deny due process. [Citation.] Absent a showing of an abuse of discretion and prejudice, the trial court's denial does not warrant reversal." (*People v. Doolin* (2009) 45 Cal.4th 390, 450.)

C. No Error

Defendant sought a continuance to investigate grounds for filing a new trial motion, but speculation does not constitute good cause. (*People v. Riccardi* (2012) 54 Cal.4th 758, 834, disapproved on another ground in *People v. Rangel* (2016) 62 Cal.4th

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[8] Section 1050, subdivision (b), requires that "a written notice shall be filed and served on all parties to the proceeding at least two court days before the hearing sought to be continued, together with affidavits or declarations detailing specific facts showing that a continuance is necessary …." A party may make an oral motion, but is required to show good cause for failing to comply with the requirement set forth in subdivision (b). (*Id.*, subd. (c).)

1192, 1216, citing *People v. Doolin*, *supra*, 45 Cal.4th at p. 451.) Moreover, defendant's oral motion for a continuance was brought only after the court denied his alternate motions to dismiss the stalking counts, to reduce the stalking counts to misdemeanors and to grant probation. The information identified by counsel as forming the possible basis for a new trial motion was known to defendant and his counsel, at the latest, approximately 13 weeks before the sentencing hearing at which the continuance was sought.[9] Notably, counsel offered no explanation in this case for his late request for the continuance. (See § 1050, subd. (d).) As such, the trial court did not err in finding a lack of due diligence and denying the motion for a continuance as untimely, and we find no merit to defendant's contention that he was deprived of the opportunity to adequately prepare a defense. (*People v. Riccardi*, *supra*, at p. 834 ["'Denial of … a motion for a continuance, when no good cause is demonstrated, is not an abuse of discretion.'"].) In light of this conclusion, we do not address the parties' arguments concerning prejudice.

III. Ineffective Assistance of Counsel

A. Standard of Review

Finally, we turn to defendant's related claim that trial counsel rendered ineffective assistance of counsel in failing to bring a timely new trial motion. "In order to establish a claim for ineffective assistance of counsel, a defendant must show that his or her counsel's performance was deficient and that the defendant suffered prejudice as a result of such deficient performance. (*Strickland v. Washington* (1984) 466 U.S. 668, 687–692.) To demonstrate deficient performance, [the] defendant bears the burden of showing that counsel's performance '"'"'fell below an objective standard of reasonableness … under prevailing professional norms.'"'"' (*People v. Lopez* (2008) 42 Cal.4th 960, 966.) To demonstrate prejudice, [the] defendant bears the burden of

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9 Christina testified regarding defendant's phone calls and his mother's threat to Maribel on June 8, 2016, and the prosecutor and defense counsel spoke with jurors following the verdict on June 14, 2016.

showing a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different. (*Ibid.*; *In re Harris* (1993) 5 Cal.4th 813, 833.)" (*People v. Mickel* (2016) 2 Cal.5th 181, 198.)

"On appeal, we do not second-guess trial counsel's reasonable tactical decisions." (*People v. Lucas* (2014) 60 Cal.4th 153, 278, disapproved on another ground in *People v. Romero and Self* (2015) 62 Cal.4th 1, 53, fn. 19.) "[A] defendant's burden [is] 'difficult to carry on direct appeal,' as a reviewing court will reverse a conviction based on ineffective assistance of counsel on direct appeal only if there is affirmative evidence that counsel had '"'no rational tactical purpose'"' for an action or omission." (*People v. Mickel, supra,* 2 Cal.5th at p. 198, quoting *People v. Lucas* (1995) 12 Cal.4th 415, 437.)

B. Analysis

Whatever may have motivated counsel to make a last minute oral motion for a continuance to bring a new trial motion, we do not agree with defendant's contention that because counsel did so, it follows that meritorious grounds for the motion existed and he was prejudiced by counsel's failure to prepare a timely new trial motion. Defendant's argument is underpinned by nothing more than conjecture given that at the juncture in time counsel sought the continuance, he had not yet definitively identified grounds for bringing a new trial motion. Rather, he wanted to investigate certain issues further.

With respect to potential phone records, the record is devoid of any indication that defendant did not make any phone calls to Christina from prison. If he had not made any, that information was surely known to defendant at the time of Christina's testimony, at which time he could have alerted counsel to the issue in a timely manner.

Regarding Christina's testimony that defendant's mother threatened someone named Maribel at her place of employment several weeks before this trial, defendant's mother was listed as a potential defense witness, but counsel elected not to have her testify. This was a tactical decision that we do not question, although we note the obvious potential risk in calling a witness who allegedly intervened, armed with an ice

pick, when defendant was trying to kick down a door to reach Christina and who allegedly threatened Christina repeatedly. Given the allegation that defendant's mother telephoned Christina's work and threatened people several weeks before trial, however, she could have been questioned on that issue had it been critical to the defense. In any event, the exploration of prison phone records and alleged threats by defendant's mother concerned impeachment material, and "'"[a] new trial on the ground of newly discovered evidence is not granted where the only value of the newly discovered testimony is as impeaching evidence" or to contradict a witness of the opposing party.'" (*People v. Jimenez* (2019) 32 Cal.App.5th 409, 423, quoting *People v. Hall* (2010) 187 Cal.App.4th 282, 299.)

As for any potential juror misconduct, based on the parties' postverdict arguments, the parties met with at least some of the jurors after the verdicts were taken and of those jurors, at least some did not believe Christina's testimony was credible in its entirety. However, there is no indication that jurors rejected Christina's testimony overall—the verdict clearly demonstrates otherwise—and critical aspects of Christina's testimony were corroborated by third parties, including two police officers in two separate jurisdictions, two former neighbors and Christina's supervisor. Speculation regarding what an investigation into juror misconduct might reveal is not grounds for a new trial. (See *People v. Mora and Rangel* (2018) 5 Cal.5th 442, 518 ["A trial court does not abuse its discretion in declining to hold an evidentiary hearing or denying a motion for a new trial when the only basis to grant such a hearing or trial is, as in this case, a defense attorney's hearsay assertions."].)

Under these circumstances, we decline defendant's invitation to presume that meritorious grounds for a new trial motion existed and counsel was therefore deficient in failing to bring a timely motion. Defendant bears the burden of showing error on appeal and he has not met that burden. (*People v. Mickel, supra,* 2 Cal.5th at p. 198.)

Accordingly, we reject his claim of ineffective assistance of counsel and, having found no error, we need not reach the issue of prejudice.

DISPOSITION

The judgment is affirmed.

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MEEHAN, J.

WE CONCUR:

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DETJEN, Acting P.J.

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SMITH, J.